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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 504

KINGSPORT PRESS, INC., PETITIONER

v.

FRANK W. MCCULLOCH, ET AL.

and

LOCAL 175, ELECTROTYPERS UNION, INTERNATIONAL STEREOTYPERS AND ELECTROTYPERS UNION OF NORTH AMERICA, AFL–CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–2a) and the district's court order (Pet. 4a) are not yet reported. The Board's decision and direction of election (Pet. 5a–13a) and its supplemental decision and order (Pet. 13a–19a) are reported at 146 NLRB Nos. 136 and 137.

JURISDICTION

The judgment of the court of appeals (Pet. 3a) was entered on June 25, 1964. The petition for a writ of certiorari was filed on September 16, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal district court has jurisdiction to enjoin and set aside a representation election under the National Labor Relations Act at the suit of an employer alleging that the Board has exceeded its statutory authority, where the Board's action is not clearly erroneous and the statute provides another procedure for obtaining review of the employer's contentions in the courts of appeals.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 20a–26a to the petition.

STATEMENT

The undisputed facts, as set forth in the complaint, the exhibits attached thereto, and the exhibits attached to petitioner's motion to dismiss the complaint, may be summarized as follows:

Petitioner ("the Company") operates a book manufacturing plant in Kingsport, Tennessee. For several years prior to the events leading to this litigation, the Company had been a party to collective bar-

gaining agreements with various craft unions[1] covering approximately 1,600 of its production and maintenance employees. The agreements had the common expiration date of January 31, 1963. Despite repeated bargaining sessions, the Company and the unions were unable to reach agreement on new contracts, and the unions called a strike on March 11, 1963. The strike is still in progress, although the Company has continued the operations of its plant by using strike replacements, nonstrikers and some returned strikers. The majority of the original strikers, however, have not returned to work. (R. 2-4.)[2]

On January 27, 1964, four of the five striking unions filed petitions with the Regional Director for the Board's Tenth Region, pursuant to Section 9(c) of the National Labor Relations Act, requesting that representation elections be conducted in various units alleged by the unions to be appropriate for collective bargaining purposes. On February 10, 1964, the Regional Director, by order, consolidated the four cases and directed a hearing thereon, which was conducted on February 20, 21, 24, and 25, 1964. Various legal and factual issues were litigated at the hearing, including the Company's claims regarding the appro-

[1] Kingsport Printing Pressmen & Assistants' Union No. 336, International Printing Pressmen & Assistants' Union of North America, AFL–CIO; International Typographical Union, Local No. 940; Local 175, Electrotypers Union, International Stereotypers and Electrotypers Union, AFL–CIO; Bindery Workers Union, Local No. 82, International Brotherhood of Bookbinders, AFL–CIO; and Progressive Lodge No. 1694, International Association of Machinists, AFL–CIO.

[2] "R." refers to the mimeographed record prepared for the court of appeals and filed with the petition.

priateness of the unit sought by the Electrotypers Union, the unit placement of certain employees, the supervisory status of others, and whether two of the unions' petitions should have been dismissed because the unions already possessed Board certifications attesting to their representative status. (R. 4–5.)

When testimony and argument were concluded, the official reporter informed the Hearing Officer and the parties that, according to her estimate, the complete transcript would not be available until March 6, 1964. The Company requested that the date for filing briefs be extended to March 17, 1964, but the Hearing Officer directed that all briefs be filed by March 9, 1964. At the same time, he informed the parties that the four cases had been transferred to the Board for final decision.[3] On February 27, 1964, the Company moved the Board to extend the time for filing briefs from March 9 to March 17. (R. 5–6.)

On March 5, 1964, after considering the transcript of the hearing, the final portion of which had been delivered to it on March 3 (R. 32), the Board issued a Decision and Direction of Elections, granting the Company's motion to extend the time for filing of briefs until March 17, 1964, but directing that elections be held on the four petitions on March 10, 1964 (Pet. 5a–13a). The Board indicated that its decision was predicated on the facts established by the record, and the positions of the parties as set forth at the

[3] Under Section 102.67(h) of the Board's Rules and Regulations (29 C.F.R. 102.67(h)), the Regional Director is empowered to transfer election cases whenever "it appears to [him] that the proceeding raises questions which should be decided by the Board" (Pet. 32a).

hearing (Pet. 6a, n. 2). Explaining its variation from the normal practice of considering briefs prior to the direction of an election, the Board stated (Pet. 11a–12a):

> 5. The petitions herein were filed during the pendency of an economic strike involving the Petitioners and the Employer. The strike, as previously indicated, commenced March 11, 1963, and is still in progress. Under Section 9(c)(3) of the Act, as amended, "employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act *in any election conducted within twelve months after the commencement of the strike.*" [Emphasis supplied.] It may thus be seen that unless the elections sought herein are held before the expiration of the indicated twelve-month period, those strikers who have been replaced will be rendered ineligible to vote. Therefore, in order to implement to the extent possible the Congressional intent to enfranchise replaced strikers during the first twelve months of an economic strike, we have decided to direct an election to be held no later than March 10, 1964, without awaiting any briefs which parties may file. We believe that this procedure, although a departure from that normally followed, is warranted by the circumstances and will effectuate the purposes and policies of the Act. * * *

The Board added that it would consider the briefs of the parties, when filed, as motions for reconsideration. To insure that the briefs would be considered be-

fore the results of the election were known, it directed that the ballots cast in all the elections be impounded (Pet. 12a).

On March 9, 1964, the day before the scheduled election, the Company filed the instant suit in the District Court for the District of Columbia, seeking to enjoin the election on the grounds, *inter alia*, that the Board had violated the requirements of Section 9(c) of the Act and of its own rules (R. 2–14). A temporary restraining order was denied by the district court, and the election took place as scheduled. The Company then amended its complaint, to request that the Board and its agents be enjoined from counting the ballots and from taking any further action in the representation cases, and that the direction of elections be set aside (R. 54–55). The Board, in turn, filed a motion to dismiss the complaint, or, in the alternative, for summary judgment in its favor, on the grounds that the district court was without jurisdiction of the subject matter of the action, the action was premature, and the complaint failed to state a claim on which relief may be granted (R. 56).

On March 17, 1964, the Company filed a brief with the Board, which, pursuant to its decision of March 5, was treated as a motion for reconsideration of findings adverse to the Company (R. 132). On April 27, 1964, the Board, after consideration of the Company's contentions, found them to be without merit, and directed the Regional Director to open and count the ballots cast on March 10 (Pet. 13a–19a).

Shortly after issuance of this Supplemental Decision, argument was had in the district court on the

Board's motion to dismiss the complaint, and on May 7, the district court granted the motion "for the reason that the Court lacks jurisdiction over the subject matter of the action" (Pet. 4a).

The Company appealed. On May 15, 1964, the court of appeals, after hearing, denied the Company's motion for an injunction pending appeal, and ordered that the appeal be expedited (R. 142). On June 25, 1964, after further hearing, it entered its decision affirming the district court's dismissal of the complaint (Pet. 1a–2a).[4]

ARGUMENT

The decision of the court of appeals is correct. There is no conflict of decisions and no other occasion for review by this Court. Only last Term, in *Boire* v. *Greyhound Corp.*, 376 U.S. 473, this Court noted the congressional determination to provide for review of an election in the courts "only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election" (376 U.S. at 479).

1. The petition for certiorari relies chiefly upon an alleged conflict between the decision below and *Boire* v. *Greyhound Corp.*, 309 F. 2d 397 (C.A. 5), with respect to whether an employer may *ever* secure judicial review of an NLRB order in a representation proceeding by an independent action under 28 U.S.C. 1337, under the doctrine of *Leedom* v. *Kyne*, 358 U.S.

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[4] Thereafter, the ballots were tallied, but the Board's final decision is awaiting the disposition of the challenges and objections which have been filed.

184.[5] We submit that there is no conflict of decisions and that the abstract question sought to be raised is inappropriate for review for two independent reasons.

(a) The decision of the Fifth Circuit in *Boire* v. *Greyhound Corp.* lost all vitality after reversal by this Court. 376 U.S. 473. The fact that the Court held the particular order to be unreviewable in an independent action without passing upon the abstract question whether an employer may *ever* obtain review by that method lends emphasis to our contention that no such broad issue is presented or should be decided here.

(b) There is no reason to suppose that the court below based its decision upon the broad ground that *Leedom* v. *Kyne* is never available to an employer. The prior decisions mentioned by petitioner[6] were not cited. The summary *per curiam* disposition strongly suggests that the decision rested upon the circumstances of the particular case. Even if district court review at the suit of an employer is warranted in the event of plain error of a quasi-jurisdictional

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[5] *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, and similar cases involving foreign-flag ships (see *Empresa Hondurena de Vapores, S.A.* v. *McLeod*, 300 F. 2d 222 (C.A. 2)) are "not to be taken as an enlargement of the exception in *Kyne*." *McCulloch* v. *Sociedad Nacional*, 372 U.S. at 17. They authorize district court review only where this is necessitated by "the presence of public questions particularly high in the scale of our national interest because of their international complexion * * *." *Ibid.* This exception is plainly inapplicable here.

[6] See *General Cable Corp.* v. *Leedom*, 278 F. 2d 237 (C.A.D.C.); *Atlas Life Ins. Co.* v. *Leedom*, 284 F. 2d 231 (C.A.D.C.); *Miami Newspaper Printing Pressmen's Union* v. *McCulloch*, 322 F. 2d 993 (C.A.D.C.).

nature, such review would have been wholly inappropriate in this case where the legal issues involved are narrow, debatable, and in no real sense different from those involved in the ordinary representation proceeding as to which the statute plainly contemplates review in the court of appeals. This is apparent from scrutiny of the errors that petitioner sought to urge.

(i) Petitioner contends (Pet. 10–12) that the Board violated the requirement of Section 9(c)(1) that the Board "shall provide for an appropriate hearing" and shall make its determination "upon the record of such hearing." It is clear, however, that the Board did in fact base its decision upon the record of an appropriate hearing. Prior to direction of an election, a trial-type, pre-election hearing of the sort provided for by the Board's Rules and Regulations was held. The company was entitled to[7] and did present both its legal and factual arguments in opposition to the election petitions at this hearing (R. 5). The Board had those arguments before it and considered them in reaching its decision. The Company's present contention boils down to an argument that Congress made the filing of briefs essential to any "appropriate hearing," and also made such briefs a necessary part of

[7] Sec. 101.20(c) (29 C.F.R. 101.20(c)) of the Board's Statements of Procedures provides:

"* * * The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. *The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions* * * *." (Emphasis supplied.)

"the record of such hearing." However, oral argument is an entirely appropriate substitute for written briefs, and, indeed, the term "record" normally means the evidence adduced, the documents filed, and the arguments made at the hearing. See Davis, *Administrative Law Treatise*, Sec. 8.14. Neither the face of the statute nor the legislative history supports an argument that Congress intended to impose any more rigid requirements in Section 9(c)(1).[8]

For like reasons there was no violation of the congressional intention, embodied in Section 9(c)(1), to stop the practice of holding elections prior to hearing on the representation issues. Cf. *Inland Empire District Council* v. *Millis*, 325 U.S. 697. The fact that the Board did not wait until the parties had, through their briefs, expanded on the arguments they had already been given an opportunity to make at the hearing, is hardly a return to the practice prohibited in 1947.

(ii) Petitioner's further contention (Pet. 12, 13) that the Board at least violated its own Rules and Regulations, is also without substance. Section 102.67(j) of the Board's Rules and Regulations (29 C.F.R. 102.67(j); Pet. 32a) provides that, upon "transfer of the case to the Board, the Board shall proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing,

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[8] While we do not believe that briefs are a necessary part of an election hearing, it is not without significance that the Board did give the parties an opportunity to expand their arguments or to raise any new arguments in briefs to be filed after the election was held and prior to the time that the ballots were counted.

as it may determine * * *." Thus the Board has discretion to proceed "forthwith upon the record" without the submission of briefs. While Section 102.68 (29 C.F.R. 102.68, Pet. 32a–33a) states that the record shall consist, *inter alia*, of "any briefs or other documents submitted by the parties * * *," this provision obviously means only that, if briefs have been submitted, they shall constitute part of the record—not that the record is incomplete if no briefs are filed.

(iii) Finally, petitioner contends (Pet. 14–16) that the Board's Direction of Election violated Section 9 (c)(3) of the Act, which states that economic strikers "shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act." It argues that the Board permitted the strikers to vote without first promulgating, pursuant to the procedures of the Administrative Procedure Act, rules of general applicability delineating the voting rights of economic strikers. But it is settled principle that an administrative agency like the Board is free to utilize either adjudication or formal rule-making in formulating principles and implementing policy. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 201–203; *Optical Workers' Union Local 24859* v. *National Labor Relations Board*, 227 F. 2d 687 (C.A. 5), rehearing denied, 229 F. 2d 170, certiorari denied, 351 U.S. 963. Nothing in the legislative history of Section 9(c)(3) suggests an intention to confine the Board to formal rule-making procedures, and to preclude it from using its customary case-by-case method of adjudication, in implementing the requirements of that provision.

Nor would such a limitation effectuate the purposes of Section 9(c)(3). For the problem presented by that section is to apply a recognized principle—that a striker may retain a sufficient interest in his former job to be entitled to have a voice in selecting a representative (see *Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1359–1360)—to a wide variety of factual situations. Such problems are best handled case-by-case as they arise, instead of issuing at the outset a broad general regulation which cannot adequately take into account all the variations which may develop.

2. The question in the instant case is not similar to *United Air Lines* v. *National Mediation Board*, No. 139, this Term, and *National Mediation Board* v. *Association for the Benefit of Non-Contract Employees*, No. 369, this Term, certiorari granted, October 12, 1964 (Pet. 22–23) for two reasons. *First*, under the Railway Labor Act, unlike the National Labor Relations Act, there is no statutory procedure whereby an employer can obtain review in the court of appeals of its contentions respecting the invalidity of a representation election. Cf. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297. Therefore, if the district court lacks jurisdiction to review a representation determination by the National Mediation Board, the Mediation Board's action is wholly unreviewable; whereas there is a statutory procedure for obtaining post-election review of the rulings of the National Labor Relations Board. *Second*, the issues in those cases—whether an employer is entitled to be heard at all in a representation proceeding and whether the NO UNION choice must appear on the ballot—are

broader, more fundamental, and more nearly questions of the agency's statutory power than the specialized procedural details that petitioner has sought to raise.

CONCLUSION

The courts below properly refused to grant district court review of the Board's election order, because the present case quite plainly does not involve any extraordinary circumstances such as would warrant a departure from the congressional policies embodied in the statutory plan of judicial review. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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